

**IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, et al.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 05-CV-00329-TCK-SAJ
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

**STATE OF OKLAHOMA'S MOTION FOR PROTECTIVE ORDER WITH  
RESPECT TO DEFENDANT SIMMONS FOODS, INC.'S NOTICE OF DEPOSITION  
OF OKLAHOMA ATTORNEY GENERAL W. A. DREW EDMONDSON  
AND INTEGRATED BRIEF IN SUPPORT THEREOF**

COMES NOW the Plaintiff, the State of Oklahoma, *ex rel.* W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, (hereinafter "the State"), and respectfully moves this Court for a protective order with respect to Defendant Simmons Foods, Inc.'s Notice of Deposition of Oklahoma Attorney General W.A. Drew Edmondson. Specifically, the State seeks a protective order prohibiting the deposition of Oklahoma Attorney General W.A. Drew Edmondson ("Attorney General Edmondson"). Fed. R. Civ. P. 26(c)(1). In support of its Motion, the State states as follows:

1. The State is the plaintiff in this action. Attorney General Edmondson is not the plaintiff in this action; rather, he is the lead attorney for the State. Attorney General Edmondson is also a top government official.

2. Depositions of attorneys for a party to a case are strongly disfavored, and Defendant Simmons Foods cannot make a showing of the exceptional circumstances that might

warrant the deposition of Attorney General Edmondson. Further, depositions of top government officials are disfavored, and Defendant Simmons Foods has made no showing of compelling reasons that might warrant the deposition of Attorney General Edmondson.

3. The requested relief is therefore necessary to protect the State and Attorney General Edmondson from annoyance, oppression and undue burden and expense.

## **I. Background**

The Attorney General is the chief law officer for the State. 74 Okla. Stat. § 18. 74 Okla. Stat. § 18b delineates the duties and powers of the Attorney General, which in pertinent part reads:

- A. The duties of the Attorney General as the chief law officer of the state shall be:
1. To appear for the state and prosecute and defend all actions and proceedings, civil or criminal, in the Supreme Court and Court of Criminal Appeals in which the state is interested as a party;
  2. To appear for the state and prosecute and defend all actions and proceedings in any of the federal courts in which the state is interested as a party;
  3. To initiate or appear in any action in which the interests of the state or the people of the state are at issue, or to appear at the request of the Governor, the Legislature, or either branch thereof, and prosecute and defend in any court or before any commission, board or officers any cause or proceeding, civil or criminal, in which the state may be a party or interested; and when so appearing in any such cause or proceeding, the Attorney General may, if the Attorney General deems it advisable and to the best interest of the state, take and assume control of the prosecution or defense of the state's interest therein;

\* \* \*

74 Okla. Stat. 18b(A)(1)-(3). As chief law officer of the State, the Attorney General possesses complete dominion over all litigation in which he properly appears in the interest of the State.

*State ex rel. Derryberry v. Kerr-McGee Corp.*, 516 P.2d 813, 818 (Okla. 1973).

Consistent with these powers and duties, on June 13, 2005, the State, by and through its Attorney General, filed a complaint against the Poultry Integrator Defendants for their pollution of the Illinois River Watershed in the United States District Court for the Northern District of Oklahoma. *See* DKT #2. While the complaint was brought "ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma" -- that is "by or on the relation of" W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, *see Black's Law Dictionary* (8th ed. 2004) -- the State is the real party in interest and the sole plaintiff in this case.<sup>1</sup> *See* 74 Okla. Stat. 18b(A)(1)-(3); *cf. United States v. Northside Realty Associates, Inc.*, 324 F. Supp. 287, 291 (N.D. Ga. 1971) ("Although this suit was initiated by the [United States] Attorney General, the real party in interest is the United States. Such suits may be brought in the name of the sovereign to protect the interest of the sovereign in seeing that its laws are enforce[d]"); *State ex rel. Norvell v. Credit Bureau of Albuquerque, Inc.*, 514 P.2d 40, 43 (N.M. 1973) (in suit brought *ex relatione* in the name of the state by the attorney general, the state is the proper party litigant and the attorney general is the attorney for the state). Indeed, the caption of the complaint and the text of the complaint clearly reflect that the State is the sole plaintiff.<sup>2</sup> *See* DKT #2. Confirming this fact, the civil cover sheet that accompanied the complaint plainly lists Attorney General Edmondson as attorney for the State. *See* DKT #1.

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<sup>1</sup> The fact that the State is the plaintiff and Attorney General Edmondson is not a plaintiff has been pointed out to Defendants. *See, e.g.*, Exhibit 1 (e-mail exchange between counsel for State and counsel for Simmons) ("The attorney general is not the plaintiff, the State of Oklahoma is the party"); State of Oklahoma's Response to "Supplemental Brief in Support of Defendant Cobb-Vantress, Inc.'s First Motion to Compel," (DKT #960) p. 1 fn 1 ("... Cobb-Vantress states that the plaintiff in this action is Attorney General W.A. Drew Edmondson. Cobb-Vantress is wrong. The State of Oklahoma is the plaintiff in this action").

<sup>2</sup> This complaint was subsequently amended in August 2005 to include a claim under the Solid Waste Disposal Act. However, that amendment to the complaint in no way affects the matter at issue here.

Further confirming this fact is that Attorney General Edmondson filed an entry of appearance as attorney for the State the same day. *See* DKT #3.

Despite the fact that it is the State, not Attorney General Edmondson, that is the plaintiff in this case, on December 13, 2006, counsel for Defendant Simmons Foods served a Notice of Deposition for "the deposition of Plaintiff Drew Edmondson, commencing on Tuesday, February 13, 2007 . . . ." Exhibit 2. Counsel for the State has, pursuant to LCvR 37.1, met and conferred with counsel for Defendant Simmons Foods in a good faith effort to resolve this discovery dispute and the parties have been unable to reach an accord. Accordingly, the State is filing this motion for protective order.

## **II. Legal Standard**

Fed. R. Civ. P. 26(c) provides that "[u]pon motion by a party or by the person from whom discovery is sought . . . and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following (1) that the disclosure or discovery not be had." While typically the movant for a protective order bears the burden of proof for a protective order, where it is established (as is the case here) that the person sought to be deposed is (1) counsel for one of the parties, or (2) a top government official, the burden shifts to the party seeking the deposition to show that the sought-after discovery is appropriate. *See, e.g., Boughton v. Cotter Corp.*, 65 F.3d 823, 829 (10th Cir. 1995); *Church of Scientology of Boston v. Internal Revenue Service*, 138 F.R.D. 9, 12 (D. Mass. 1990).

## **III. Argument**

- A. Depositions of attorneys for a party to a case are strongly disfavored, and Defendant Simmons Foods cannot make a showing of the exceptional circumstances required to justify the deposition of Attorney General Edmondson.**

Quoting the reasoning of the seminal decision on the issue -- *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) -- the court in *In re Muskogee Environmental Conservation Company, Inc.*, 221 B.R. 526, 532 (Bankr. N.D. Okla. 1998), stated:

Taking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standard of the profession, but it also adds to the already burdensome time and costs of litigation. It is not hard to imagine additional pretrial delays to resolve work-product and attorney-client objections, as well as delays to resolve collateral issues raised by the attorney's testimony. Finally, the practice of deposing counsel detracts from the quality of client representation. Counsel should be free to devote his or her time and efforts to preparing the client's case without fear of being interrogated by his or her opponent.

*See also Simmons Foods, Inc. v. Willis*, 191 F.R.D. 625, 630 (D. Kan. 2000) ("experience teaches that countenancing unbridled depositions of attorneys often invites delay, disruption of the case, harassment, and unnecessary distractions into collateral matters") (citations and quotations omitted). *West Peninsular Title Co. v. Palm Beach County*, 132 F.R.D. 301, 302 (S.D. Fla. 1990) ("Federal courts . . . have held that depositions of attorneys inherently constitute an invitation to harass the attorney and parties, and to disrupt and delay the case. Moreover, costs are added to litigation, burdens are placed upon attorneys, and the attorney client relationship is threatened. These presumptions may constitute good cause for obtaining a protective order under Rule 26(a)") (citations omitted). Put another way, efforts to depose opposing counsel are presumed annoying, oppressive, harassing and unduly burdensome.

Accordingly, "requests to depose opposing counsel are subject to great scrutiny and are to be sparingly granted." *In re Muskogee Environmental Conservation Company*, 221 B.R. at 532. "[T]he taking of the deposition of opposing counsel should only be allowed *where the party seeking to take the deposition has established*: (1) the only means of obtaining information is through deposition of opposing counsel; (2) the information sought is relevant and non-

privileged; and (3) information sought is crucial to the preparation of the case." *In re Muskogee Environmental Conservation Company*, 221 B.R. at 529 (emphasis added), relying on *Boughton v. Cotter Corp.*, 65 F.3d 823, 829 (10th Cir. 1995), citing *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986). The burden of establishing that all three of these criteria are met is on the party seeking the deposition. *Simmons Foods*, 191 F.R.D. at 630. Moreover, "even when a party satisfies all three of the *Shelton* factors, courts may prohibit such depositions in other appropriate situations." *Simmons Foods*, 191 F.R.D. at 630 (citation and quotations omitted).

There is no reason to believe that any non-privileged, relevant information sought by Defendant Simmons Food through a deposition of Attorney General Edmondson could not be secured through written discovery and / or through depositions of other individuals. Moreover, even assuming arguendo that such non-privileged, relevant information sought by Defendant Simmons Food could only be secured through a deposition of Attorney General Edmondson, there is no reason to believe that such information would be *crucial* to the case preparation of Defendant Simmons Food. This case, after all, turns on the conduct of the Poultry Integrator Defendants and the effect of that conduct on the environment of the Illinois River Watershed.

**B. Depositions of top government officials are disfavored, and Defendant Simmons Foods has made no showing of compelling reasons that might warrant the deposition of Attorney General Edmondson.**

In addition to the fact that depositions of attorneys for a party to a case are strongly disfavored, depositions of top government officials -- of which the office of Attorney General is clearly one -- are likewise disfavored. As explained by the court in *Church of Scientology of Boston v. Internal Revenue Service*, 138 F.R.D. 9, 12 (D. Mass. 1990):

In general, heads of agencies and other top government executives are normally not subject to depositions. The rationale pursuant to this policy is that such

officials must be free to conduct their jobs without the constant interference of the discovery process. An exception to this general rule exists concerning top officials who have direct personal factual information pertaining to material issues in an action. A top government official may, however, *only be deposed upon a showing that the information to be gained from such a deposition is not available through any other source.*

(Citations omitted) (emphasis added). Furthermore, except upon a clear showing that the testimony of the official is necessary to prevent injustice to the party seeking the deposition, "[i]t has been recognized that a member of the Cabinet or the head of a large executive department should not be called upon to give his deposition if such deposition is taken in order to probe the mind of the official to determine why he exercised his discretion as he did in regard to a particular matter." *Northside Realty Associates*, 324 F.Supp. at 293 (citations omitted). In the instant case, there is no reason to believe that any non-privileged, relevant information sought by Defendant Simmons Foods through a deposition of Attorney General Edmondson could not be secured through another source (e.g., written discovery and / or through depositions of other individuals). Moreover, inasmuch as the Attorney General's exercise of his discretion is not at issue in this case, even assuming arguendo that it were able to make such a showing, there is no reason to believe that Defendant Simmons Foods could make the necessary showing of injustice to justify a deposition of the Attorney General.

#### **IV. Conclusion**

WHEREFORE, premises considered, the State's motion for a protective order prohibiting the deposition of Attorney General Edmondson should be granted.

Respectfully Submitted,

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